Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LEVON MARKARIAN and EVA MARKARIAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Government is exempt from establishing and maintaining Article III standing in a civil forfeiture action.

2. Whether the Court of Appeals for the Ninth Circuit misconstrued the substantive provisions of the Civil Asset Forfeiture Reform Act of 2000.

PARTIES TO THE PROCEEDING

Petitioners are Levon and Eva Markarian, the last remaining claimant's in the Government's civil forfeiture action.

Respondent is the United States of America.

The defendant in the Government's civil forfeiture action is the real property located at 5208 Los Franciscos Way, Los Angeles, California.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-13a)[1] is reported at *U.S. v. 5208 Los Franciscos Way, LA, Cal.*, 385 F.3d 1187 (9th Cir. 2004). The order of the United States District Court, Eastern District of California (Pet. App. 16a-24a) is reported at *U.S. v. Prop. Located at 5208 Los Franciscos Way*, 252 F.Supp.2d 1060 (E.D.Cal. 2003).

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2004. A petition for panel rehearing with suggestion for rehearing en banc was denied on January 14, 2005. Pet. App. 25a-26a. A motion for stay of mandate and motion to file subsequent petitions for rehearing and rehearing en banc was denied on March 1, 2005. Pet. App. 25a-26a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Jurisdictional Standing under the United States Constitution, Article III, Section 2, Clause 1 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands

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[1] The Appendix filed in connection with the Petition for Certiorari is cited herein as Pet. App. __.

under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS INVOLVED

The Civil Asset Forfeiture Reform Act of 2000, Pub.L. 108-185, § 2(a), 114 Stat. 202-211, added 18 U.S.C. § 983, and § 7(a), 114 Stat. 214-215 added 18 U.S.C. § 985.

The relevant subsections at issue in the present petition:

18 U.S.C. § 983(c) provides:

> Burden of proof.–In a suit or action brought under any civil forfeiture statute for the civil recovery of any property–
>
> (1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;
>
> (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and
>
> (3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

18 U.S.C. § 983(d)(6) provides:

> In this subsection, the term "owner" –
>
> (A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership; and

(B) does not include—

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

18 U.S.C. § 985(c)(3) provides:

> If real property has been posted in accordance with this subsection, it shall not be necessary for the court to issue an arrest warrant in rem, or to take any other action to establish in rem jurisdiction over the property.

STATEMENT OF THE CASE

1. The Civil Asset Forfeiture Reform Act of 2000 provides added safeguards to claimants of property that is subject to seizure by the Government under a civil forfeiture action. Levon Markarian and Eva Markarian ("Markarians") petition this Court from the Ninth Circuit's affirmance of the district court's grant of summary judgment in favor of the United States of America based on a finding that the Markarians did not have standing to file a claim in the Government's Civil Forfeiture Action against the real property located at 5208 Los Franciscos Way, Los Angeles, California.

In March of 1998, the Markarians' daughter, Anahit Margarian ("Anahit"), purchased real property located at 5208 Los Franciscos Way, Los Angeles, California ("Real Property") for approximately $500,000.00, submitting a $300,000.00 down payment. Pet. App. 5a. In November of 1998, Anahit deeded the Real Property to her parents, Levon Markarian and Eva Markarian. Pet. App. 5a. The deed was

recorded in March of 1999. Pet. App. 5a. Anahit was "found guilty of Health Care Fraud and Aiding and Abetting (18 U.S.C. § 1347 and 18 U.S.C. § 2) by a jury and was sentenced in June, 2001, to a term of 41 months imprisonment." Pet. App. 5a.[2]

2. On October 22, 2001, the Government filed a VERIFIED COMPLAINT FOR FORFEITURE *IN REM* under 18 U.S.C. § 981(a)(1)(C) ("FIRST CLAIM FOR RELIEF") and 18 U.S.C. § 1956(a)(1)(B)(i) ("SECOND CLAIM FOR RELIEF"). Pet. App. 29a-35a. The Government's claims were based on the allegation that the $300,000.00 down payment for the Real Property was acquired with the proceeds traceable to Anahit's violation of 18 U.S.C. §1347. Pet. App. 33a. In support of this allegation, the Government relied on the statement of Anahit's counsel made during her sentencing hearing:

> Judge Damrell: Are you conceding that your client says that some of that $300,000 might have come from that fraud.
> Mr. Geragos: I'm conceding that some of that $300,000 likely is. Pet. App. 33a.

On November 15, 2001, the Markarians filed a timely CLAIM TO DEFEND FORFEITURE PURSUANT TO SUPPLEMENTAL RULE C(6). Pet. App. 5a, 36a-37a.

On July 24, 2002, the Government filed a NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT.

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[2] The summary section of the Ninth Circuit's opinion incorrectly states that "[t]he Markarian's daughter had transferred the property . . . one month prior to being convicted of health care fraud." Pet. App. 2a. The background section of the Court's opinion correctly states that "[i]n March 1999, Anahit recorded the previously executed gift deed transferring the defendant property to the Markarians. The following month, Anahit was charged with health care fraud . . . ." Pet. App. 5a. The published opinion reported at *U.S. v. 5208 Los Franciscos Way, LA, Cal.*, 385 F.3d 1187 (9th Cir. 2004) does not include the summary section.

Pet. App. 6a, 41a-42a. The grounds for seeking summary judgment were that the Markarians "lack standing under Article III of the United States Constitution to maintain a claim." Pet. App. 6a.[3]

On February 5, 2003, the District Court filed a MEMORANDUM AND ORDER, granting the Government's motion for summary judgment. Pet. App 6a, 16a-24a. A FINAL JUDGMENT OF FORFEITURE was filed on February 14, 2003. Pet. App. 6a.

3. On March 7, 2003, the Markarians filed a timely NOTICE OF APPEAL. On March 10, 2003, the Markarians filed a MOTION FOR STAY PENDING APPEAL. On March 11, 2003, the Ninth Circuit denied the motion. Pet. App. 14a. The Markarians were ordered to vacate the Real Property by March 12, 2003. On May 2, 2003, the Government sold the Real Property for $725,000.00.

On September 2, 2003, the Markarians filed a MOTION FOR AN ORDER PRESERVING THE RIGHT OF THE APPEALING PARTY TO THE FULL VALUE OF THE REAL PROPERTY 28 U.S.C. § 1355(c). On November 18, 2003, the Ninth Circuit denied the motion without prejudice to consideration of the merits panel. Pet. App. 15a.

After briefing and oral argument, the Ninth Circuit entered its opinion on October 1, 2004. Pet. App. 1a-13a. The Markarians filed a timely PETITION FOR PANEL REHEARING WITH SUGGESTION FOR PANEL REHEARING EN BANC. On January 14, 2005, the Ninth Circuit denied the petition. Pet. App. 25a-26a. On January

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[3] A second ground for seeking summary judgment was that "[b]cause the United States has entered into settlements with the other claimants in this action, and because no other claimants have come forward to assert timely claims, the United States further requests that a final judgment of forfeiture shall be entered in a form consistent with prior settlements that vests all right, title and interest in the defendant real property to the United States." Pet. App. 42a.

20, 2005, the Markarians filed a MOTION FOR STAY OF MANDATE MOTION TO FILE SUBSEQUENT PETITIONS FOR REHEARING AND FOR REHEARING EN BANC. The Ninth Circuit denied the motion on March 1, 2005. Pet. App. 27a-28a.

4. Initial jurisdiction in the District Court was based on 28 U.S.C. §1345 and 28 U.S.C. § 1355. The Ninth Circuit's jurisdiction was based on 28 U.S.C. § 1291.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents two novel issues: (1) Whether the *Government* was required to maintain Article III Standing at the summary judgment stage of its civil forfeiture action; and (2) Whether summary judgment was properly granted in light of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). Public Law 106-185, 114 Stat. 202-225. Both of these issues are inextricably intertwined. The Ninth Circuit has misconstrued the substantive provisions of CAFRA. The proper construction of CAFRA "has not been, but should be, settled by this Court."

Under an Article III standing analysis, while finding that the Government established Article III Standing at the pleading stage, the Ninth Circuit refused to address whether the Government lost its Article III standing at the summary judgment stage. To maintain Article III standing at the summary judgment stage, the Government, as the moving party with the burden of proof under CAFRA, must come forward with evidence that would entitle it to a directed verdict.

Under a summary judgment merits analysis, after affirming the district court's erroneous weighing of the evidence to conclude that the Markarians lacked Article III Standing, the Ninth Circuit then failed to address whether the Government was entitled to the Markarians' home "as a matter of law" under CAFRA. *See* Fed.R.Civ.P. 56(c).

The Ninth Circuit "departed from the accepted and usual course of judicial proceedings" "in a way that conflicts with relevant decisions of this Court" by refusing to recognize and apply the following legal mandates.

1. Federal courts have an independent obligation to determine whether subject matter jurisdiction exists at every stage of the litigation.
2. It is the *Government's* burden, as plaintiff, to maintain Article III standing at *every stage* of the litigation.
3. At the summary judgment stage, the Government, as the moving party with the burden of proof at trial under CAFRA, *must* support its Article III standing with evidence that would entitle it to a directed verdict.
4. Under a summary judgment merits analysis, the Government must establish that it is entitled to judgment as a matter of law—the Civil Asset Forfeiture Reform Act of 2000.
5. Under summary judgment, the nonmoving party is not required to file an opposition to defeat the moving party.
6. Under summary judgment, a determination of Anahit's *intent* to fraudulently transfer the Real Property to her parents is a jury function, not the function of a district court.

This appears to be the first Ninth Circuit opinion to address the substantive provisions of the Civil Asset Forfeiture Reform Act of 2000. CAFRA shifted the burden of proof to the Government to establish by a preponderance of the evidence that the property was subject to forfeiture. Prior to CAFRA, after the Government established probable cause to arrest the property *in rem*, the burden shifted to the claimant to prove by a preponderance of the evidence that the property was *not* subject to forfeiture. In relying on pre-CAFRA cases, the Ninth Circuit misconstrued CAFRA's

new evidentiary provisions and erroneously assumed that the burden of proof had shifted to the claimants. In the present case, the Government never met its burden of proof.

The Ninth Circuit's opinion holds that if the Government eliminates the claimants, either through default or summary judgment, then it gets the property without ever having to prove anything. The Ninth Circuit concluded that "[t]he substantive merits of the government's forfeiture action — whatever they may be — cannot be raised by the Markarians in the context of the present appeal." Pet. App. 12a. The Government got the Markarians' home without establishing, "by a preponderance of the evidence, that the property is subject to forfeiture," or establishing "that there was a substantial connection between the property and the offense." 18 U.S.C. § 983(c). The Court's opinion has rendered the provisions of the Civil Asset Forfeiture *Reform* Act meaningless. This case could be called the Ninth Circuit's 2005 Reform of the Civil Asset Forfeiture Reform Act of 2000.

Moreover, the Court's opinion establishes that a claimant cannot raise a jurisdictional issue of his own Article III standing at the appellate level unless he first objects in the district court, notwithstanding the principle that jurisdictional issues can be raised at any time. The Ninth Circuit reasoned that "[h]ad the Markarians mounted *any* opposition to the government's motion for summary judgment, it is entirely possible that they could have met their threshold burden under Article III." Pet. App. 10a-11a (italics in original). With respect to a *claimant's* Article III standing, the Ninth Circuit's opinion directly conflicts with another opinion filed by the same Ninth Circuit three-judge panel. *See U.S. v. $4,224,958.57*, 379 F.3d 1146, 1149 (9th Cir. 2004) (NOONAN, J.) (citing *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). This case also conflicts with the Eighth Circuit's opinion in *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003), cited

by the Ninth Circuit for the holding that to satisfy Article III standing "the claimant need demonstrate only a colorable interest in the property, for example, by showing actual possession, control, title, or financial stake." This case is especially troubling because the Court noted that "[t]he Markarians timely filed a [verified] claim [(Pet. App. 36a-37a)] asserting an ownership interest in the defendant property," (Pet. App. 5a), and then, surprisingly, found that the Markarians lacked Article III standing to contest the Government's forfeiture action under CAFRA.[4]

More importantly, this may be the first case in which a claimant has challenged the *Government's* Article III standing in a forfeiture action. The Government lost its Article III standing at the summary judgment stage. Accordingly, the district court, as well as the Ninth Circuit, was without jurisdiction to address the merits of the Government's forfeiture action. The Second Circuit correctly recognized that it is the Government's burden, as plaintiff in a civil forfeiture action, to establish and maintain Article III standing. *See U.S. v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 78-79 (2nd Cir. 2002), In a recent unpublished opinion by the same three-judge panel which decided the present case, the Ninth Circuit rejected the claimant's assertion that the "district court was required to address the *government's* 'Article III standing' before addressing the Trust's Article III standing." *U.S. v. Real Property Located at 7700 Stein Way, Unit 132, Park City, Utah; $190,000 United States Currency; 22 Acre Ranch on Deer Spring Road, San Marcos, California*, 2005 WL 697038 (9th Cir. (Cal)) (March 28, 2005) (citing 5208 Los Franciscos Way, 385 F.3d at 1193) (italics in original). The Ninth Circuit avoids its independent obligation to determine the Government's

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[4] The Government admitted that the Markarians were the legal owners in its verified complaint (Pet. App. 32a-33a); Government's undisputed fact 18 (Pet. App. 18a); and Lis Pendens (Pet. App. 39a).

Article III standing as plaintiff by erroneously focusing on the claimant's Article III standing. In essence, the Government is exempt from Article III standing in the Ninth Circuit.

In sum, the Ninth Circuit's opinion conflicts with *U.S. v. $4,224,958.57*, 379 F.3d 1146, 1149 (9th Cir. 2004) (claimant's Article III standing); *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003) (claimant's Article III standing); and *U.S. v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 (2nd Cir. 2002) (Government's Article III standing). Because an Article III standing analysis is intertwined with a merits analysis, this case presents two substantial questions that should be settled by this Court: (1) Whether the Government is exempt from having to establish and maintain Article III standing; and (2) The proper construction of the Civil Asset Forfeiture Reform Act of 2000.

A. FORFEITURE LAW UNDER THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

The courts do not generally favor forfeitures. *U.S. v. Premises Known as 7725 Unity Ave. N., Brooklyn Park, Minn.*, 294 F.3d 954, 958 (8th Cir. 2002); *see also U.S. v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). Consequently, they should be enforced according to the letter and spirit of the governing provisions. *1936 Model Ford V-8*, 307 U.S. at 226. In the present case, no one disputes that the Civil Asset Forfeiture Reform Act of 2000 is applicable.

Although the District Court never mentioned CAFRA (Pet. App. 16a-24a), the Ninth Circuit at least recognized that CAFRA applied to the Markarians' case. Pet. App. 11a-12a. As the Sixth Circuit noted, "the legislation is primarily remedial in nature. It corrects an aberration that existed previously by leveling the playing field between the government and persons whose property has been seized.

Here, the legislation raises the government's burden of proof in civil forfeiture actions to the burden normally borne by the plaintiff in a civil case—preponderance of the evidence." *U.S. v. Real Property in Section 9, Town 29 North*, 241 F.3d 796, 799 (6th Cir. 2001) (citations omitted).

The Ninth Circuit recognized that prior to CAFRA, the burden of proof in a civil forfeiture action "tilted heavily in the government's favor." Pet. App. 11a (citation omitted). The Government only had to establish probable cause to initiate the forfeiture proceeding. Once it did that, the burden shifted to the claimant to demonstrate by a preponderance of the evidence that the property was *not* subject to forfeiture. Pet. App. 11a. Significantly, "CAFRA 'transferred the burden of proof from the claimant to the government and required the government to establish forfeiture by a preponderance of the evidence rather than by the lower probable cause standard.'" Pet. App. 11a (citations omitted).

The Government filed a civil forfeiture action in October of 2001, asserting two claims under 18 U.S.C. § 981(a)(1)(C) (FIRST CLAIM FOR RELIEF) and 18 U.S.C. § 1956(a)(1)(B)(i) (SECOND CLAIM FOR RELIEF). Pet. App. 29a-35a. 18 U.S.C. § 981(a)(1)(C) provides that property derived from the proceeds traceable to a health care fraud violation, which is defined in 18 U.S.C. § 1956(c)(7)(F), is subject to forfeiture to the Government. Under 18 U.S.C. § 1956(a)(1)(B)(i) (SECOND CLAIM), the Government alleged that "[t]he defendant real property is property *involved in* a financial transaction which represents the proceeds of some form of unlawful activity." Pet. App. 35a (emphasis added).

CAFRA additionally provides that "if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial

connection between the property and the offense." 18 U.S.C. § 983(c)(3). The Eighth Circuit, in *U.S. v. Dodge Caravan Grand SE/Sport Van*, in applying the standards set forth in CAFRA, recognized that because the Government contented that the claimant's vehicle facilitated the commission of the crime, "CAFRA requires the government to 'establish that there was a substantial connection between the property and the offense.'" *U.S. v. Dodge Caravan Grand SE/Sport Van*, 387 F.3d 758, 761 (8th Cir. 2004). In the present case, therefore, the Government must establish by a preponderance of the evidence that the Markarians' home was substantially connected to the proceeds derived from Anahit's health care fraud violation.[5]

B. ARTICLE III STANDING LAW

This Court has stated that it is required to address the issue of standing "even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *U.S. v. Hays*, 515 U.S. 737, 742 (1995) (citation omitted) (brackets in original). *See also* Fed.R.Civ.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").[6]

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[5] Interestingly, under CAFRA, probable cause is no longer required to seize "real property." *See* 18 U.S.C. § 981(b), and 18 U.S.C. § 985(c)(3). If a tree falls in the forest and no one hears it, has it made a sound? If the Government files an unsubstantiated civil forfeiture action, and no one files a claim, does the Government get the real property? For example, under the Court's reasoning in this case, the Government could file an *in rem* forfeiture complaint against real property, without probable cause to file the complaint, and get the real property without ever having to prove anything.

[6] The Markarians have consistently suggested to the Ninth Circuit that the Government had lost its jurisdiction at the summary judgment stage.

While the Ninth Circuit correctly noted that "Article III standing must be determined as a threshold matter," Pet. App. 7a, the Court failed to recognize that it is "the party invoking federal jurisdiction [that] bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998) (citation omitted). As the Second Circuit pointed out, "[i]t must be remembered, however, that in a civil forfeiture action the *government* is the plaintiff, and it is the government's right to forfeiture that is the sole cause of action adjudicated." *U.S. v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 (2nd Cir. 2002) (italics in original). Thus, in a civil forfeiture action, it is the Government's burden, as plaintiff, to establish and maintain Article III standing.

The three irreducible constitutional requirements for standing which comprise the core of Article III's case-or-controversy requirement are: (1) an injury in fact; (2) causation; and (3) redressability. *Steel Co.*, 523 U.S. at 102-103. More importantly, these standing requirements must *continue* to exist at every stage of review, not merely at the time of filing the complaint. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). If the plaintiffs fail to satisfy an element of standing at any point, the action becomes moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Since the three standing requirements are not mere pleading requirements "but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). To maintain Article III standing at the summary judgment stage, the Government, with the burden of proof under CAFRA, must come forward with evidence that would entitle it to a directed verdict. "'Where, as here, the *moving*

party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (citing *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991) (italics in original). This rule appears to follow from this Court's reasoning in *Anderson v. Liberty Lobby, Inc.*, in which the Court held that:

> The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict– "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (citation omitted). Justice Brennan's dissent in *Celotex Corp. v. Catrett*, noted that:

> The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence– using any of the materials specified in Rule 56(c)–that would entitle it to a directed verdict if not controverted at trial. *Ibid.*
>
> *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (BRENNAN, J, dissenting) (italics in original).

Moreover, "'a directed verdict is proper when the evidence permits only one reasonable conclusion as to the verdict.'" *Rudiger Charolais Ranches v. Van De Graaf*, 994 F.2d 670, 672 (9th Cir. 1993) (citation omitted). "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51(1986). "But—particularly where, as here, the moving party is also the party with the burden of proof on the issue—it is important to remember the non-moving party must produce its significant, probative evidence only after the movant has satisfied its burden of demonstrating there is no genuine dispute on *any* material fact." *Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991) (emphasis added).

It's important to point out that the Government moved the district court for summary judgment on two grounds: (1) The Markarians, "as the sole non-settling claimants remaining in this action" lack Article III Standing to maintain a claim; and (2) the Government requests that a final judgment of forfeiture be entered "that vests all right, title and interest in the defendant real property to the United States." Pet. App. 42a. Not only must the Government establish that the Markarians lack Article III standing, the Government must also establish that it is entitled to the Markarians' home. *Cf.* Fed.R.Civ.P.56(c) (Summary judgment is appropriate if "there is no genuine issue as to any material fact *and* that the moving party is entitled to judgment as a matter of law.") (emphasis added). The Ninth Circuit has recognized that "[b]oth requirements must be met." *U.S. v. $273,969.04 U.S. Currency*, 164 F.3d 462, 464 (9th Cir. 1999).

In analyzing a case for summary judgment or for a directed verdict, this Court is "convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 477 U.S. at 252. Thus, with respect to the second ground raised by the Government, the Article III standing inquiry at the summary judgment stage becomes whether reasonable minds could conclusively find that the Government has proven by a *preponderance of the evidence* that the Markarians' home was derived from proceeds

substantially connected to Anahit's health care fraud violation. The Government, as the moving party with the burden of proof at trial, must establish with sufficient credible evidence that it is entitled to the Markarians' home. As a practical matter, the district court, or any court considering its own jurisdiction, must conduct a merits analysis under a directed verdict standard to resolve the Article III standing inquiry at the summary judgment stage.

The Ninth Circuit and district court focused on the Government's first ground for summary judgment and failed to address the second ground. Even assuming, for the sake of argument, that the Markarians lacked Article III standing as claimants, the Government cannot get the Markarians' home by default unless and until it meets its burden of proof under CAFRA. This was the Government's strategy before CAFRA, as the Government only had to establish probable cause to initiate the forfeiture proceeding. Once it did that, the burden shifted to the claimant to demonstrate by a preponderance of the evidence that the property was *not* subject to forfeiture. *See U.S. v. $80,180 in U.S. Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002). If the claimants failed to file a claim, the property went to the Government by default. CAFRA was supposed to change that by leveling the playing field between the Government and claimants. *See U.S. v. Real Property in Section 9, Town 29 North*, 241 F.3d 796, 799 (6th Cir. 2001).

C. THE GOVERNMENT LOST ITS ARTICLE III STANDING AT SUMMARY JUDGMENT[7]

The Article III Standing inquiry at the summary judgment stage is whether the Government has enough credible evidence to entitle it to a directed verdict under CAFRA. In

[7] While not conceding the issue, it's likely that the Government lacked Article III standing at the pleading stage. The Government never alleged that the Markarians' home was derived from proceeds *substantially connected* to Anahit's health care fraud violation.

other words, has the Government established by a preponderance of the evidence that the Markarians' home was substantially connected to the proceeds derived from Anahit's health care fraud violation? A review of the Government's Verified Complaint, Pet. App. 29a-35a, establishes that the only shred of evidence to support a conclusion that the down payment for the Real Property was derived from proceeds substantially connected to Anahit's health care fraud violation was the purported judicial admission of Anahit's sentencing attorney that "some of that $300,000 [down payment] likely" came from the fraud. Pet. App. 33a-34a.

The Ninth Circuit has recognized that "[i]n the absence of egregious circumstances, parties are generally bound by the admissions of their attorney, including oral admissions." *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1509 (9th Cir. 1993) (citations omitted). More importantly, the Third Circuit has noted that "to be binding, judicial admissions must be unequivocal." *Glick v. White Motor Company*, 458 F.2d 1287, 1291 (3rd Cir. 1972) (citing *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880)). And in a Sixth Circuit case involving General Motors, the Court recognized that "[i]n order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous. The statements of General Motors' counsel do not rise to this level. First, counsel used words such as 'probably' and 'suggesting' in making his comments, indicating that such remarks were guarded and qualified." *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) (citing *Oscanyan v. Arms Co.*).

In the present case, the Government's reliance on counsel's concession that some of that $300,000 likely was derived from proceeds traceable to Anahit's health care fraud violation for a down payment on the Real Property does not rise to the level of a judicial admission under *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880). The Government has not

established by a preponderance of the evidence that the Markarians' home was substantially connected to the proceeds derived from Anahit's health care fraud violation. The Government's evidence does not entitle it to a directed verdict under CAFRA's heightened burden of proof. Counsel's concession at Anahit's sentencing hearing was guarded and ambiguous. Moreover, counsel's concession does not prove or admit that *any* proceeds from the health care fraud violation were used to acquire the real property. Again, "[i]f reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson,* 477 U.S. at 250-51.

Thus, under a directed verdict evidentiary analysis at the summary judgment stage, the Government could no longer maintain its Article III standing. Article III standing is perhaps the most important jurisdictional doctrine. *See U.S. v. Hays*, 515 U.S. at 742. This Court counsels that "'if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" *Steel Co.*, 523 U.S. at 95 (brackets in original) (citations omitted).

D. CONTRARY TO OTHER COURT OF APPEALS, THE NINTH CIRCUIT'S ARTICLE III STANDING REQUIREMENTS FOR CLAIMANTS GOES FAR BEYOND SHOWING A COLORABLE INTEREST IN THE PROPERTY

The Eighth Circuit has stated that "[t]o have standing, a claimant need not prove the underlying merits of the claim. The claimant need only show a colorable interest in the property, redressable, at least in part, by a return of the property." *U.S. v One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). The Eighth Circuit concluded

that "although there is evidence that Andrews has only 'bare legal title,' we conclude that is sufficient to confer Article III standing to contest the forfeiture." *Id.* at 1013. The Second Circuit has stated that "the only question that the courts need assess regarding a claimant's standing is whether he or she has shown the required 'facially colorable interest,' not whether he ultimately proves the existence of that interest." *U.S. v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2nd Cir. 2002). The Court went on to hold that "because Mercado submitted a *verified claim* that he was the owner of the funds, we hold that he showed a sufficiently colorable interest to satisfy Article III standing requirements." *Id.* at 79 n.10 (emphasis added). The First Circuit has noted that "[c]ourts generally do not deny standing to a claimant who is either the colorable owner of the res or who has any colorable possessory interest in it." *U.S. v. U.S. Currency, $81,000.00*, 189 F.3d 28, 35 (1st Cir.1999) (citations omitted).

The Markarians have always asserted that they had Article III standing to challenge the Government's unsubstantiated forfeiture action. The Markarians filed a verified claim alleging an ownership interest in the Real Property. Pet. App. 36a-37a. The Government admitted in its verified complaint that the Markarians were the title owners of the Real Property. Pet. App. 32a-33a. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (noting that judicial admissions in the pleadings are generally binding on the parties and the court, as well as on appeal). The Government also filed a LIS PENDENS with the Los Angeles County Recorder admitting that the Markarians were the "Recorded Owners." Pet. App. 39a. The district court noted that the Markarians filed a timely [verified] claim in which they "asserted an ownership interest in the defendant real property." Pet. App. 20a. The Ninth Circuit even noted that "[t]he Markarians timely filed

a [verified] claim asserting an ownership interest in the defendant property." Pet. App. 5a.

The Ninth Circuit understood that to satisfy Article III standing the claimant's burden is not a heavy one; "the claimant need demonstrate only a colorable interest in the property, for example, by showing actual possession, control, title, or financial stake." Pet. App. 7a (citing *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003)). *See also U.S. v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1119 (9th Cir. 2004) (stating that "[i]n order to contest a forfeiture, a claimant need only have some type of property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest, including a possessory interest."). The Markarians were also in actual possession of the Real Property "[f]or six months every year." Pet. App. 34a (Government's verified complaint).

While recognizing that a claimant's burden is not a heavy one, and while admitting that the Markarians were the owners[8] of the real property, the Ninth Circuit added the requirement that "[o]wnership interest is determined under the law of the state in which the interest arose – here, California."[9] Pet. App. 7a. The Court went on to a lengthy discussion of California's Uniform Fraudulent Transfer Act of 1986 ("UFTA") and agreed with the district court that the "government presented substantial evidence to support the existence of numerous badges of fraud, . . ." Pet. App. 9a.

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[8] The Ninth Circuit, in *U.S. v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1119 (9th Cir. 2004), also stated that "[o]wners have standing to challenge forfeitures of their property, . . ."

[9] Under pre-CAFRA, there was no definition of owner. Courts would, therefore, have to refer to state law to determine an ownership interest in property. CAFRA added a definition of owner at 18 U.S.C. § 983(d)(6). Reference to state law should no longer be necessary.

Applying California's UFTA, the Ninth Circuit agreed with the district court's weighing of Anahit's badges of fraud, "from which an inference of fraudulent intent may be drawn." Pet. App. 8a. The district court concluded that "the strong evidence establishing the existence of numerous badges of fraud, the court finds that the defendant real property was transferred with the actual intent to 'hinder, delay, or defraud' the Government in violation of California Civil Code section 3439.04(a). Accordingly, the transfer was voidable and claimants Eva and Levon Markarian lack standing to contest the civil forfeiture action." Pet. App. 24a. The district court's analysis was not proper. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson*, 477 U.S. at 255 (citation omitted). The Markarians have claimed "'a sufficient ownership interest in the property to create a case of controversy.'" *U.S. v. $4,224,958.57*, 379 F.3d 1146, 1149 (9th Cir. 2004) (citing *U.S. v. One Lincoln Navigator 1998*) (decided by the same three-judge panel that decided the Markarians' case).

E. THE NINTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE MARKARIANS COULD NOT CHALLENGE THE DISTRICT COURT'S RULING ON APPEAL BECAUSE THEY DID NOT OPPOSE THE GOVERNMENT'S SUMMARY JUDGMENT MOTION IN THE DISTRICT COURT

1. THE MARKARIANS' ARTICLE III STANDING

The Ninth Circuit stated that "[h]ad the Markarians mounted *any* opposition to the government's motion for summary judgment, it is entirely possible that they could have met their threshold burden under Article III." Pet. App.

10a-11a. (italics in original). The Court seems to be saying that since the Markarians failed to oppose the Government's motion in the district court, it's now too late to raise the issue under *de novo* review on appeal. However, jurisdictional issues "may be raised at any stage of the proceedings, including for the first time on appeal." *A-Z Intern. v. Phillips*, 179 F.3d 1187, 1190 (9th Cir. 1999) (citation omitted). *See also U.S. v. Hays*, 515 U.S. at 742 (recognizing that standing is perhaps the most important of the jurisdictional doctrines). Thus, the Markarians should be able to defend their threshold burden under Article III standing, even for the first time on appeal.

2. THE MARKARIANS WERE NOT OBLIGATED TO OPPOSE THE GOVERNMENT'S MOTION

The Markarians were also not obligated to oppose the Government's summary judgment motion unless and until the Government established by a preponderance of the evidence that the Markarians' home was substantially connected to Anahit's health care fraud violation. "If the Government fails to meet its burden of proof (formerly probable cause, now preponderance), the claimant need not produce any evidence at all—i.e., the claimant has no 'case' that he must present or 'elements' to which he bears the burden of proof." *U.S. v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 (2nd Cir. 2002). "'[P]articularly where, as here, the moving party is also the party with the burden of proof on the issue—it is important to remember the non-moving party must produce its significant, probative evidence only *after* the movant has satisfied its burden of demonstrating there is no genuine issue of material fact.'" *Houghton*, 965 F.2d at 1536-37 (citation omitted) (emphasis added). "'Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*'" *Adickes v. S.H. Kress and*

Company, 398 U.S. 144, 160 (1970) (italics in original) (footnote omitted). As previously discussed, the Government has not come forward with *any* credible evidence as a matter of law under CAFRA to establish its entitlement to the Markarians' home. The Markarians, therefore, were not obligated to oppose the Government's summary judgment motion.

CONCLUSION

For all the foregoing reasons, the Markarians respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

LEVON MARKARIAN; EVA M. MARKARIAN,
Claimants-Appellants,

and

FEDERAL HOME MORTGAGE LOAN CORPORATION; VARTER KARAGOZ, NARIK KARAGOZ; CITIBANK; FEDERAL SAVINGS BANK,
Claimants,

No. 03-15396
D.C. No.
CV-01-01956 FCD

v.

REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018, INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,
Defendants.

OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Jr., District Judge, Presiding

Argued and Submitted
August 6,2004–Pasadena, California

Filed October 1, 2004

Before: John T. Noonan and Richard R. Clifton, Circuit Judges, and Jeremy Fogel, District Judge*

Opinion by Judge Fogel

SUMMARY

Civil Litigation and Procedure/Forfeiture

The court of appeals affirmed a judgment of the district court. The court held that claimants lack Article III standing to contest a civil forfeiture where the government shows that the transfer of forfeited property to the claimants was fraudulent under California's Uniform Fraudulent Transfer Act (UFTA) and the claimants fail to present any evidence whatsoever to the contrary.

Appellee the government filed a civil forfeiture action in district court, seeking to forfeit real property transferred to appellants Levon and Eva Markarian by their daughter on the basis that, among other things, it was acquired with funds traceable to a federal health care offense, which rendered the property subject to forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(c) and 1956(c)(7)(F). The Markarians' daughter had transferred the property—purchased after an audit revealed that her company had overbilled California's Medi-Cal program by more than $300,000—one month prior to being convicted of health care fraud. The Markarians filed a claim asserting an ownership interest in the property. The government moved for summary judgment on the ground that the Markarians lacked Article III standing to contest the forfeiture because the transfer of the property was fraudulent under California's UFTA. The Markarians failed to oppose the motion. The court granted the government's motion and entered final judgment of forfeiture.

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* The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

The Markarians appealed.

[1] Article III standing must be determined as a threshold matter in every federal case. In a forfeiture action, this determination turns upon whether the claimant has a sufficient interest in the property to create a case or controversy. Ownership interest is determined under the law of the state in which the interest arose. [2] Under California's UFTA, a transfer is fraudulent if it is made with actual intent to hinder, delay, or defraud any creditor of the transferor. While the presence of certain badges of fraud does not create a presumption of fraud, it does constitute evidence from which an inference of fraudulent intent may be drawn.

[3] Because the government met its initial burden of presenting evidence from which a trier of fact could conclude that the transfer to the Markarians was fraudulent, the burden shifted to the Markarians to demonstrate a triable issue of material fact as to the fraudulent nature of the transfer. The Markarians, however, failed to oppose the government's motion. Accordingly, the district court properly concluded as a matter of law that the transfer of the property was fraudulent, and that as a result the Markarians lacked Article III standing to contest the forfeiture action. [4] Had the Markarians mounted any opposition to the government's motion for summary judgment, it was entirely possible that they could have met their threshold burden under Article III. However, because the government presented evidence that the transfer of the property was fraudulent under state law, and the Markarians failed to present any evidence whatsoever to the contrary, the district court properly concluded that there were no triable issues of material fact with respect to that issue. Having reached that conclusion, the district court had no alternative other than to find that the Markarians lacked Article III standing to contest the forfeiture.

[5] The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) transferred the burden of proof from the claimant

to the government and required the government to establish forfeiture by a preponderance of the evidence rather than by the lower probable cause standard. **[6]** CAFRA also provides expressly that the government may use evidence gathered after the filing of a forfeiture complaint to meet this burden. This provision would be meaningless if the government were required to meet the preponderance standard merely to commence an action. **[7]** Because the district court properly determined that the Markarians lacked a sufficient interest in the property to confer Article III standing, the Markarians had no legal basis upon which to object to the forfeiture. The judgment of the district court had to be affirmed.

COUNSEL

Kenneth Owen, Esq., Castro Valley, California, for the claimants-appellants.

McGregor W. Scott, United States Attorney, and Courtney J. Linn, Assistant United States Attorney, Sacramento, California, for the plaintiff-appellee.

OPINION

FOGEL, District Judge:

This is an appeal from a final judgment of forfeiture in a civil forfeiture action. After the action was terminated with respect to all other claimants, the district court granted summary judgment in favor of the United States and against the only remaining claimants, Levon and Eva Markarian ("the Markarians"), concluding that the Markarians lacked Article III standing to contest the forfeiture. The district court thereafter entered a final judgment of forfeiture. The Markarians assert that the district court erred in ruling that they lacked Article III standing and in entering the final judgment of forfeiture.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the judgment.

BACKGROUND

In 1995, Anahit Margarian ("Anahit") and William Cherkezian formed a company that purportedly was in the business of providing wholesale medical supplies and equipment. In January 1998, the California State Controller's Office notified Anahit and Cherkezian that an audit had revealed that the company had overbilled the state's Medi-Cal program by an amount in excess of $300,000. In March 1998, Anahit purchased the defendant real property located at 5208 Los Franciscos Way in Los Angeles, California for $500,000, tendering a down payment of $300,000. In November 1998, Anahit executed but did not record a gift deed transferring the defendant property to her Romanian parents, the Markarians.

In January 1999, Anahit was advised of an ongoing probe into the company by the Federal Bureau of Investigation ("FBI"). In March 1999, Anahit recorded the previously executed gift deed transferring the defendant property to the Markarians. The following month, Anahit was charged with health care fraud under 18 U.S.C. § 1347, as well as aiding and abetting under 18 U.S.C. § 2. She was tried by a jury and found guilty of both offenses in February 2001. In June 2001, she was sentenced to forty-one months imprisonment and ordered to pay $850,000 in restitution. That conviction has been affirmed.

In October 2001, the government filed the instant civil forfeiture action, seeking to forfeit the defendant property on the basis that, *inter alia*, it was acquired with funds traceable to a federal health care offense, which rendered the property subject to forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(c) and 1956(c)(7)(F). The Markarians timely filed a claim asserting an ownership interest in the defendant property.

The government reached settlement or obtained entry of default with respect to all other claimants, leaving the Markarians as the only claimants contesting the forfeiture.

In July 2002, the government moved for summary judgment on the ground that the Markarians lacked Article III standing to contest the forfeiture. Specifically, the government argued that Anahit's transfer of the property to the Markarians was fraudulent under California's Uniform Fraudulent Transfer Act ("UFTA"), Cal. Civ. Code § 3439 *et seq.*, and that the Markarians thus could not establish an ownership interest in the property sufficient to give them standing. In connection with the briefing on that motion, the government requested that the district court take judicial notice of a number of documents, including the transcript of Anahit's sentencing hearing. In November 2002, while the government's motion for summary judgment was pending, the district court issued an order permitting the Markarians' attorney to withdraw as counsel of record. In the same order, the district court set the government's motion for hearing on January 31, 2003 and ordered that any opposition to the motion be filed on or before January 17, 2003. The Markarians failed to oppose the motion,[1] and on January 28, 2003 the court vacated the hearing date and ordered the motion submitted without oral argument. The court filed its memorandum and order granting the government's motion for summary judgment on February 5, 2003[2] and entered final judgment of forfeiture on February 14, 2003.

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[1] On January 3, 2003, Anahit filed a motion for extension of time, requesting a continuance of the government's motion for summary judgment. The district court denied the motion on the ground that Anahit had failed to file a timely claim to the property and thus was precluded from appearing in the action pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

[2] On March 6, 2003, the district court issued a modified memorandum and order to correct a typographical error. The modified memorandum and order was published and appears as *United States v. Real Property*

STANDARD OF REVIEW

We review *de novo* a district court's finding that a claimant lacks standing to challenge a civil forfeiture. *United States v. Real Property Known As 22249 Dolorosa St., Woodland Hills, CA*, 167 F.3d 509, 511(9th Cir. 1999).

We also review *de novo* a district court's grant of summary judgment. *United States v. Ranch Located In Young, AZ*, 50 F.3d 630, 632 (9th Cir. 1995). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

DISCUSSION

A. The Markarians' Article III Standing

[1] Article III standing must be determined as a threshold matter in every federal Case. *State of Nevada v. Burford*, 918 F.2d 854, 856 (9th Cir. 1990). In a forfeiture action, this determination turns upon whether the claimant has a sufficient interest in the property to create a case or controversy. *United States v. One Lincoln Navigator1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). The claimant's burden under Article III is not a heavy one; the claimant need demonstrate only a colorable interest in the property, for example, by showing actual possession, control, title, or financial stake. *Id.* Ownership interest is determined under the law of the state in which the interest arose — here, California. *See id*; *Ranch Located In Young, AZ*, 50 F.3d at 632.

Located at 5208 Los Franciscos Way, Los Angeles, California, 252 F.Supp.2d 1060 (E.D. Cal. 2003).

[2] The district court's ruling that the Markarians lacked Article III standing was based upon its conclusion that Anahit's transfer of the defendant property to the Markarians was fraudulent under California's UFTA.[3] In particular, the district court relied upon Cal. Civ. Code § 3439.04(a) and the Legislative Committee Comment thereto. Pursuant to these authorities, a transfer is fraudulent if it is made "[w]ith actual intent to hinder, delay, or defraud" any creditor of the transferor. Cal. Civ. Code § 3439.04(a). The Comment provides that while the presence of certain "badges of fraud" does not create a presumption of fraud, it does constitute evidence from which an inference of fraudulent intent may be drawn.[4] Cal. Civ. Code § 3439.04, cmt. 5 (1986).

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[3] The Markarians assert that the district court erred in applying California's UFTA in order to determine whether they had an ownership interest in the defendant property. Specifically, they argue that the innocent owner defense codified at 18 U.S.C § 983(d) has eliminated the necessity to rely upon state law. The Markarians also assert that the district court "put the cart before the horse" by requiring them to establish their innocent owner defense before requiring the government to establish by a preponderance of the evidence that the defendant property was subject to forfeiture. The Markarians are confusing two separate inquiries: (1) whether a claimant has a sufficient ownership interest in the defendant property to confer Article III standing and (2) whether a clamant is an "innocent owner" as defined under 18 U.S.C § 983(d). *See One Lincoln Navigator*, 328 F.3d at 1014 (distinguishing between these two inquiries). The district court addressed only the former question, and properly referred to state law in doing so. The Markarians have not cited any authority holding that the innocent owner defense was intended to, or did, change the manner in which ownership interest is analyzed for purposes of Article III standing.

[4] Section 3439.04 has been amended, effective January 1, 2005, to include in the text of the statute the badges of fraud listed in the Comment and relied upon by the district court. 2004 Cal. Legis. Serv. ch. 50, § 1 (S.B. 1408) (West); Cal. Gov't Code § 9600(a) (setting forth the general rule that "a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute").

The badges of fraud listed by the Comment include: (a) whether the transfer or obligation was to an insider; (b) whether the debtor retained possession or control of the property transferred after the transfer; (c) whether the transfer or obligation was disclosed or concealed; (d) whether the debtor was sued or threatened with suit before the transfer was made or obligation was incurred; (e) whether the transfer was of substantially all the debtor's assets; (f) whether the debtor has absconded; (g) whether the debtor removed or concealed assets; (h) whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (i) whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (1) whether the transfer occurred shortly before or shortly after a substantial debt was incurred; (k) whether the debtor transferred the essential assets of the business to a lienor who then transferred the assets to an insider of the debtor. *Id.*

The district court concluded that the government presented substantial evidence to support the existence of numerous badges of fraud, citing the following facts: the transfer of the defendant property was to an insider; the value of the consideration received was not reasonably equivalent to the value of the asset transferred; Anahit retained control and possession of the defendant property after the transfer, as evidenced by the fact that she continued to pay homeowner's association fees and otherwise held herself out as the owner; the transfer was not disclosed to the homeowner's association or the bank holding the first deed of trust on the property; at the time the transfer took place Anahit knew the State Controller's Office was seeking remittance of more than $300,000 in overbillings; and at the time the transfer was recorded Anahit was aware that the FBI was investigating her company. The court also cited the transcript of Anahit's sentencing hearing, during which the

court found expressly that the transfer was an effort on Anahit's part to conceal assets and remove them from the reach of the government.

[3] Because the government met its initial burden of presenting evidence from which a trier of fact could conclude that the transfer to the Markarians was fraudulent, the burden shifted to the Markarians to demonstrate a triable issue of material fact as to the fraudulent nature of the transfer. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986); Fed. R. Civ. P. 56(e). The Markarians, however, failed to oppose the government's motion. Accordingly, the district court properly concluded as a matter of law that the transfer of the defendant property was fraudulent,[5] and that as a result the Markarians lacked Article III standing to contest the forfeiture action. *See Ranch Located In Young, AZ*, 50 F.3d at 632 (applying Arizona's UFTA to conclude that claimant lacked standing to contest forfeiture action).

[4] As noted previously, a claimant need demonstrate only a colorable interest in the defendant property in order to establish Article III standing. Had the Markarians mounted *any* opposition to the government's motion for summary

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[5] The Markarians assert that the district court erred in taking judicial notice of the sentencing transcript and statements made therein. The government made a formal request for judicial notice as part of its motion for summary judgment, and the Markarians failed to object. Ordinarily, we will not review issues raised for the first time on appeal. *Pflingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). Even if we were to reach the issue and were to find error, such error would be harmless because the district court's decision was based primarily upon the badges of fraud under Cal. Civ. Code § 3439.04(a). The reference to Anahit's sentencing appears at the very end of the analysis, and the transcript is mentioned almost in passing. *See 5208 Los Franciscos Way*, 252 F.Supp.24 at 1064. Even excluding the sentencing transcript, there was ample evidence in the record to support the district court's ruling.

judgment, it is entirely possible that they could have met their threshold burden under Article III. However, because the government presented evidence that the transfer of the property was fraudulent under state law, and the Markarians failed to present any evidence whatsoever to the contrary, the district court properly concluded that there were no triable issues of material fact with respect to that issue. Having reached that conclusion, the district court had no alternative other than to find that the Markarians lacked Article III standing to contest the forfeiture.

B. Government's "Article III Standing" And District Court's Jurisdiction

[5] Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), the burden of proof in civil forfeiture actions "tilted heavily in the government's favor." *United States v. $80,180 in U.S. Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002). The government had the initial burden of establishing that probable cause existed to institute a forfeiture proceeding. *Id.* Once probable cause was established, the claimant could avoid forfeiture only by establishing, by a preponderance of the evidence, that the property was not subject to forfeiture. *Id.* CAFRA "transferred the burden of proof from the claimant to the government and required the government to establish forfeiture by a preponderance of the evidence rather than by the lower probable cause standard." *Id.*; *see also* 18 U.S.C. § 983(c)(1).

The Markarians make the novel argument that the government must meet this burden of proof in order to establish "Article III standing" to go forward with a civil forfeiture action. They contend that because the government did not first prove by a preponderance of the evidence that the defendant property was subject to forfeiture, the district court lacked subject matter jurisdiction to proceed with the action or enter a judgment therein.

[6] The Markarians once again are conflating two separate inquiries: (1) whether the government had standing to commence and maintain a civil forfeiture action in the district court and (2) whether the government presented sufficient evidence to prevail on the merits. There can be no real dispute that the government had standing to commence the instant action. The complaint alleged that the defendant property was acquired with funds traceable to a federal health care offense – allegations that, if proved, would render the property subject to forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(c) and 1956(c)(7)(F). While the Markarians assert that the complaint was not supported at the time of filing by evidence sufficient to meet the preponderance standard, the government is not required to prove its case simply to get in the courthouse door. It is true that CAFRA imposes upon the government the ultimate burden of establishing forfeiture by a preponderance of the evidence, but the statute also provides expressly that the government may use evidence gathered after the filing of a forfeiture complaint to meet this burden. *See* 18 U.S.C. § 983(c)(2). This provision would be meaningless if the government were required to meet the preponderance standard merely to commence an action.

[7] The substantive merits of the government's forfeiture action — whatever they may be — cannot be raised by the Markarians in the context of the present appeal. Because the district court properly determined on the record before it that the Markarians lacked a sufficient interest in the defendant property to confer Article III standing, the Markarians had no legal basis upon which to object to the forfeiture. *See United States v. Real Property*, 135 F.3d 1312, 1317-18 (9th Cir. 1998) (holding that an individual who lacked standing to contest forfeiture of property could not seek relief from default judgment); *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) U.S. Currency*, 558 F.2d 1359, 1361 (9th Cir. 1977) (holding that when a claimant fails to establish the threshold requirement of standing, the claim-

ant's challenges to the merits of the forfeiture action cannot be reached).

Accordingly, the judgment of the district court is

AFFIRMED.

FILED
MAR 11 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,

Defendant.

LEVON MARKARIAN; et al.,

Claimants - Appellants,

and

FEDERAL HOME LOAN MORTGAGE CORPORATION; et al.,

Claimants.

No.03-15396

D.C. No.CV-01-01956-FCD
Eastern California
(Sacramento)

ORDER

Before: BEEZER and McKEOWN, Circuit Judges

Appellants' motion for stay pending appeal is denied.

The briefing schedule established previously shall remain in effect.

FILED
NOV 18 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

LEVON MARKARIAN; et al.,

Claimants - Appellants,

and,

FEDERAL HOME LOAN MORTGAGE CORPORATION; et al.,

Claimants,

v.

REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,

Defendant.

No.03-15396

D.C. No.CV-01-01956-FCD
Eastern California

ORDER

Before: SILVERMAN and TALLMAN, Circuit Judges

Appellants' opposed motion for an order "to preserve the full value of the real property" is denied. This denial is without prejudice to consideration by the merits panel of appropriate remedy in the event appellants prevail on appeal.

Briefing has been completed and this appeal is ready for calendaring.

FILED
FEB - 5 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,

Defendant.

LEVON MARKARIAN and EVA MARKARIAN,

Claimants.

D.C. No.CV-01-01956-FCD JFM

MEMORANDUM AND ORDER

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This matter is before the court on plaintiff United States of America's (the "Government") motion for summary judgment on the basis that the sole remaining claimants in this action, Levon Markarian and Eva Markarian (the "claimants"), lack standing to contest the civil forfeiture of the defendant real property at issue in this case. For the reasons set forth below, the government's motion for summary judgment is GRANTED.[1]

[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. See E.D. Cal. L.R. 78-230(h).

FACTUAL BACKGROUND

In 1995, Anahit Margarian ("Margarian") and William Cherkezian ("Cherkezian") entered into a business Partnership by the name of Plaza Medical Supplies, Inc. ("Plaza Medical Supplies" or the "company"). Plaza Medical Supplies was incorporated in the State of California on November 20, 1995, and was located in Los Angeles. Statement of Undisputed Facts in Supp. of Pl.'s Mot. for Summary J. ("UF"), filed July 24, 2002, UF 1, 4. Margarian was the President of the company, in which she and Cherkezian both held a half-ownership interest. UF 2, 3.

Plaza Medical Supplies was purportedly in the business of providing wholesale medical supplies and equipment. UF 5. On April 26, 1996, it became a Medi-Cal provider under the name of Cherkezian. UF 6. During the period between September 1997 and January 1998, Plaza Medical Supplies billed Medi-Cal for more supplies than it actually purchased and distributed. UF 7. As described by Cherkezian, the scheme involved contacting medical wholesalers who agreed to provide fictitious invoices, which Cherkezian and Margarian then used to justify the company's expenses to Medi-Cal. UF 8.

On or about January 30, 1998, the State Controller's Office notified Cherkezian and Margarian by letter sent to Plaza Medical Supplies that an audit had revealed the company had overbilled the Medi-Cal program in the amount of $327,297. UF 9. The State Controller's Office requested repayment in that amount to the California Department of Health Services. UF 10. However, rather than repaying, Margarian and Cherkezian hired numerous lawyers to handle the overbilling problem. UF 12, 13.

On or about March 9, 1998, Margarian purchased the defendant real property located at 5208 Los Franciscos Way in Los Angeles for $500,000, submitting a down payment in

the amount of $300,000. UF 16. During the course of the criminal sentencing proceeding following Margarian's conviction of certain health care fraud charges in June 2001, Margarian's counsel represented to the court that at least some of the money used to fund the purchase of the defendant real property likely derived from the proceeds of the Plaza Medical Supplies health care fraud scheme. UF 17; Request for Judicial Notice, filed July 24, 2002, at Ex. C (June 4, 2001 Sentencing Transcript at 17).[2] Following the purchase, in November 1998, Margarian executed a gift deed transferring the defendant real property to her Romanian parents, claimants Levon and Eva Markarian. UF 18.

A hearing on Plaza Medical Supplies' Medi-Cal overbilling issue was scheduled for January 1999. UF 14. However, Margarian's attorney at that time advised her that the hearing was canceled due to an ongoing Federal Bureau of Investigation ("FBI") probe of Plaza Medical Supplies UF 14, 15. Soon thereafter, in March 24, 1999, Margarian recorded the gift deed transferring defendant real property to claimants. UF 18.

Margarian continued to hold herself out as the owner of defendant real property even after she gift deeded it to claimants in March 1999. For example, Margarian sent a letter to the home owner's association of the subdivision in which defendant real property is located in June 2000, in which she made references to "my yard," "my property," referred to herself directly as the owner of the defendant real property in the text of the letter, and included the title "Property Owner" following her signature. UF 20. She also continued to pay fees to the home owner's association with funds taken from her personal bank account. UF 26. Finally, the records of the bank that holds the first deed of trust on defendant real property continue to indicate that Margarian is

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[2] The Government's Request for Judicial Notice, filed July 24, 2002, is hereby GRANTED.

the property owner, and reflect no deed of the property to a third party. UF 24-25.

PROCEDURAL BACKGROUND

Margarian was charged with health care fraud in violation of 18 U.S.C. § 1347 and aiding and abetting in violation of 18 U.S.C. § 2 by criminal information filed in the United States District Court for the Eastern District of California on April 19, 1999. UF 21. A superceding indictment was filed on May 28, 1999 charging the same violations. UF 21.

Margarian was tried by jury and found guilty of all charges in February 2001, and was sentenced on June 4, 2001. At her sentencing hearing, Margarian's counsel conceded that some of the money used to pay the down payment on the defendant real property likely came from the Medi-Cal fraud proceeds. UF 27. In addition, prior to imposing sentence upon Margarian, this court found that "[t]he timing of that transfer. . . was an effort on the defendant's part to conceal assets and to remove them from the reach of the Government, and that was clearly wrong, clearly wrong with respect to the failure to acknowledge her wrongdoing." UF 23. Thereafter, the Court sentenced Margarian to 41 months imprisonment, and ordered $850,000 in restitution. UF 22. The court of appeals recently affirmed Margarian's conviction. UF 22.

In the present civil forfeiture action, filed on October 22, 2001, the Government seeks to forfeit the defendant real property on the basis that it was acquired with funds traceable to the proceeds of fraud, and that the transfer of the property was intended to conceal and disguise fraud proceeds. See 18 U.S.C. §§ 981 (a)(1)(A) & (C); 18 U.S.C. § 1956(a)(1)(B)(i). The complaint in this action sets forth the same fraud allegations of which the jury found Margarian guilty in the criminal proceedings. After the filing of the forfeiture complaint, the court issued an arrest warrant for

the defendant real property. Claimants Levon and Eva Markarian thereafter timely filed a claim in which they asserted an ownership interest in the defendant real property. The Government reached a settlement with the other lienholders that filed claims. Publication and service have been completed, and the time for filing claims has now expired.

The Government filed the motion for summary judgment presently before the court on July 24, 2002. The hearing on the motion was thereafter continued to January 31, 2003. No opposition to the Government's motion for summary judgment has been filed by claimants to date.

STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States V. Diebold, Inc., 369 U.S. 654, 655 (1962). If the moving party does not bear the burden of proof at trial, he or she may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. Once the moving party meets the requirements of Rule 56 by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts

showing that there is a genuine issue for trial." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 256 (1986). Genuine factual issues must exist that "can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party." Id. at 250.

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. See T.W. Elec. V. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty. Inc. v. City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985); Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

ANALYSIS

A. Standing

The basis for the Government's motion for summary judgment is that claimants lack Article III standing to contest this civil forfeiture action. In order to establish that they have standing, claimants must demonstrate an ownership interest in the property subject to forfeiture. United States v. Ranch Located in Young, Arizona, 50 F.3d 630, 632 (9th Cir. 1995). Ownership of property is generally determined by state law. See United States v. One 1973 Rolls Royce, 43 F.3d 794, 805 n.8 (3d Cir. 1994). Because this action concerns real property located in California, federal choice of law requires that the court apply California fraudulent transfer law. See In re Lindsay, 59 F.3d 942, 948 (9th Cir. 1995). Thus, in this case, California's Uniform Fraudulent Transfer Act of 1986 ("UFTA") is applicable. Finally, where

ownership is obtained through a transfer that violates applicable state fraudulent transfer laws, the claimant lacks standing. See Ranch Located in Young, Arizona, 50 F.3d at 632.

1. Uniform Fraudulent Transfer Act

Under California's UFTA, a transfer is fraudulent if the debtor made the transfer or incurred the obligation with the actual intent to hinder, delay, or defraud any creditor. Cal. Civ. Code § 3439.04(a). The Legislative Committee Comment to the UFTA states that in determining actual intent to hinder, delay, or defraud creditors of a debtor, courts look to certain "badges of fraud," which include:

> (a) Whether the transfer or obligation was to an insider.
>
> (b)Whether the debtor had retained possession or control of the property transferred after the transfer.
>
> (c) Whether the transfer or obligation was disclosed or concealed.
>
> (d) Whether the debtor was sued or threatened with suit before the transfer was made or obligation was incurred...
>
> (h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred . . .

Cal. Civ. Code § 3439.04, Legislative Committee Comment - Assembly, 1986 Addition (citations omitted).

The Legislative Committee Comment to California Civil Code section 3439.04(a) states that the presence of one or more badges of fraud does not create a presumption of fraud. Id. However, it may serve as evidence from which an inference of fraudulent intent may be drawn. See Id. Intent to defraud in UFTA cases may be decided as a matter of law. In re Matter of Hinsley, 201 F.3d 638, 643 (5th Cir. 2000). In addition, "[a] party's self-serving and unsupported claim that she lacked the requisite intent is not sufficient to defeat

summary judgment where the evidence otherwise supports a finding of fraud." Id.

In this case, Margarian transferred the defendant real property to her parents without any consideration. Thus, the transfer was to an insider (badge (a)), and the value of the consideration received was not reasonably equivalent to the value of the asset transferred (badge (h)). See In re Serrato, 214 B.R. 219, 229-30 (N.D. Cal. 1997) ("The relationship of parent and child, when coupled with other suspicious circumstances, gives rise to an inference of fraud.") In addition, Margarian retained control and possession of the property after the transfer, as is evidenced by the fact that she continued to pay home owner's fees, and sent a letter to the home owner's association claiming an ownership interest in the property following her gift deed to claimants (badge (b)). Id. at 230. Nor was the transfer disclosed, as it appears that neither the home owner's association nor the bank holding the first deed of trust on the property were aware of the transfer to claimants (badge (c)). Finally, at the time that the transfer took place, Margarian was aware that the State Controller's Office was seeking remittance of $327,297 to the California Department of Health Services due to Medi-Cal overbillings (badge (d)). In addition, Margarian became aware that the FBI was conducting an investigation into her business between the time that she made the transfer to claimants and the time she recorded the transfer.

Thus, the Government has set forth facts to support the existence of numerous badges of fraud under California Civil Code section 3439.04(a). No evidence has been submitted to contradict these facts. In addition to these badges of fraud, in sentencing Margarian following her criminal conviction, the court found that "[t]he timing of that transfer . . . was an effort on the defendant's part to conceal assets and to remove them from the reach of the Government . . . ." See Request for Judicial Notice, filed July 24, 2002, at Ex. C (June 4,

2001 Sentencing Transcript at 25). In light of that finding as well as the strong evidence establishing the existence of numerous badges of fraud, the court finds that the defendant real property was transferred with the actual intent to "hinder, delay, or defraud" the Government in violation of California Civil Code section 3439.04(a). Accordingly, the transfer was voidable and claimants Eva and Levon Markarian lack standing to contest this civil forfeiture action.[3]

CONCLUSION

For the foregoing reasons, the Government's motion for summary judgment is GRANTED. The Government shall lodge a proposed Final Judgment of Forfeiture within ten days of the date of this order.

IT IS SO ORDERED.

DATED: February 4, 2003

"s/Frank C. Damrell, Jr."
FRANK C. DAMRELL, Jr.
UNITED STATES
DISTRICT JUDGE

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[3] Because the court grants the Government's motion for summary judgment on the merits, it does not address defendant's arguments contained at sections (A) (1) and (B) of its moving brief.

FILED
JAN 14 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No.03-15396
Plaintiff - Appellee,	D.C. No.CV-01-01956-FCD
LEVON MARKARIAN; EVA M. MARKARIAN,	
Claimants - Appellants,	ORDER
and,	
FEDERAL HOME LOAN MORTGAGE CORPORATION; VARTER KARAGOZ, NARIK KARAGOZ; CITIBANK; FEDERAL SAVINGS BANK,	
Claimants,	
v.	
REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,	
Defendants.	

Before: NOONAN, CLIFTON, Circuit Judges, and FOGEL, District Judge*

The panel has voted to deny the petition for rehearing. Judge Clifton has voted to deny the petition for rehearing en banc; and Judges Noonan and Fogel so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.35.

The petition for rehearing and the petition for rehearing en banc, filed November 15, 2004, are DENIED.

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*The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

FILED
MAR 01 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No.03-15396
Plaintiff - Appellee,	D.C. No.CV-01-01956-FCD
LEVON MARKARIAN; EVA M. MARKARIAN,	
Claimants - Appellants,	ORDER
and,	
FEDERAL HOME LOAN MORTGAGE CORPORATION; VARTER KARAGOZ, NARIK KARAGOZ; CITIBANK; FEDERAL SAVINGS BANK,	
Claimants,	
v.	
REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO,	
Defendants.	

Before: NOONAN, CLIFTON, Circuit Judges, and FOGEL, District Judge. *

Appellants' Motion for Stay of Mandate and Motion to File Subsequent Petitions for Rehearing and for Rehearing En Banc are DENIED.

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*The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

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FILED
OCT 22 2001

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO, Defendant.	CIV.S-01-1956 FCD JFM CIV- VERIFIED COMPLAINT FOR FORFEITURE *IN REM*

Plaintiff, United States of America, by and through its undersigned attorneys, in a civil case of forfeiture *in rem*, alleges that:

1. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1345 and 1355.

2. This Court has venue pursuant to 28 U.S.C. § 1395 and 18 U.S.C. § 981(h).

FIRST CLAIM FOR RELIEF
(18 U.S.C. § 981(a)(1)(C))

3. The defendant in this action is described as real property located at 5208 Los Franciscos Way, Los Angeles County, Los Angeles, California, APN: 5588-021-018, legal description:

> LOT 25 OF TRACT NO. 29326, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 731 PAGES 15 TO 17 INCLUSIVE OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

4. The United States seeks forfeiture of defendant real property, including any right, title and interest in the whole of any lot or trace and any appurtenances or improvements thereon, on the grounds that said real property constitutes or is derived from proceeds traceable to a violation of an offense constituting "specified unlawful activity" pursuant to 18 U.S.C. § 981(a)(1)(C), as defined in 18 U.S.C. § 1956(c)(7)(F). The facts in support of these allegations are as follows:

a) . On November 20, 1995, Plaza Medical Supplies, Inc. was incorporated in the State of California. Plaza Medical Supplies, Inc. was owned by William Cherkezian (50%) and Anahit Margarian (50%).

b) . Plaza Medical Supplies, Inc. was located in Los Angeles, California. It was purportedly in the business of providing wholesale medical supplies and equipment. It became a Medi-Cal provider under the name of William Cherkezian on April 26, 1996.

c) . Plaza Medical Supplies, Inc. received a provider number from Medi-Cal allowing for the electronic billing of supplies and equipment. The State of California Controller's Office located in Sacramento, California, on a weekly basis,

remits a check to providers based on the computer tape claims submitted electronically. Medi-Cal receives fifty percent (50%) of its funding from the United States Department of Health and Human Services. The State of California's Department of Health and Human Services acts as an agent for the United States in the disbursal of funds.

d) . Beginning in September 1996, and continuing through January 1998, Plaza Medical Supplies, Inc. billed Medi-Cal for more supplies than were actually purchased and distributed. In the scheme, Cherkezian and Margarian contacted medical wholesalers who agreed to provide fictitious invoices which were then used to justify Plaza Medical Supplies, Inc. expenses to Medi-Cal.

e) . Patients approached Plaza Medical supplies, Inc. with prescriptions for specific products. The patients demanded partial orders of the products along with premium gifts in exchange for their patronage. Cherkezian told FBI agents that he told Anahit Margarian that this was not a legal practice. Margarian told him that this was how business was done in this field and to remain competitive they would have to cater to this clientele.

f) . Anahit Margarian knew a number of medical wholesalers that would "sell" invoices. Plaza Medical Supplies, Inc. would issue checks to the medical wholesalers in the amounts reflected on the fictitious invoices and then receive a cash kickback from 28 to 60 percent of the total value of the fictitious invoices from the wholesalers. Plaza Medical Supplies would use the cash kickbacks to purchase the premium gifts. The gifts were purchased from a joint account of Anahit Margarian and William Cherkezian named "Chroma Enterprises". Chroma Enterprises was set up by Margarian and Cherkezian as an import/export company. The difference between the cash kickback and the cost of the gifts was split evenly between Cherkezian and Margarian. Anahit Margarian's sole source of income was Plaza Medical Supplies, Inc.

g) . From September 1996 through January 1998, Cherkezian and Margarian defrauded the Medi-Cal program of at least $850,000.00 in reimbursements for medical supplies which were never provided to Medi-Cal patients.

h) . The following businesses were in partnership with Plaza Medical Supplies, Inc. in the scheme to defraud Medi-Cal through fictitious invoices and "buying" patients:

Business	Kickback % to Plaza Medical Supplies, Inc.
H.B. Medical Appliance	40%
A&K Medical Supply Co.	40%
Montrose Medical Clinic	28%
U.S. Distributor	55%
Apical Corp.	55%
Alamo Medical Supply Co.	40%

i) . Vahe Zogravian brought patients to Plaza Medical Supplies, Inc. and received a $1,350.00 monthly fee from Cherkezian and Margarian. Zogravian supplied approximately 140 patients. Those patients would average approximately $165.00 each in billings per month to the Medi-Cal program for supplies.

j) . Plaza Medical Supplies, Inc. purchased merchandise in 1996 that was billed to Medi-Cal, but never given to customers. In order to dispose of the surplus items, Plaza Medical Supplies, Inc. donated and shipped six containers of products to the Armenian Relief Effort in 1997.

k) . On or about March 9, 1998, Anahit Margarian, as her sole and separate property, purchased defendant real property located at 5208 Los Franciscos Way, Los Angeles California for approximately $500,000.00. Anahit Margarian made a down payment in the amount of $300,000.00 on the defendant real property.

1) . On or about November 23, 1998, Anahit Margarian executed a gift deed transferring the defendant real property to her parents, Levon Markarian and Eva Markarian, husband and wife. Levon and Eva Markarian are

citizens and residents of Romania who often visit the United States. The Gift Deed was recorded on March 23, 1999.

m) . During Anahit Margarian's sentencing hearing on June 4, 2001, Judge Damrell made the following finding:

> Judge Damrell: But I am concerned about the transfer of the house. I understand that the defendant may wish to have her parents here six months out of the year, but that doesn't necessarily mean a house that now has the value of $800,000. The timing of that transfer, I think, was an effort on the defendant's part to conceal assets and to remove them from the reach of the Government, and that was clearly wrong, clearly wrong with respect to the failure to acknowledge her wrongdoing. (June 4, 2001 Sentencing Hearing Transcript, p. 25:6-15.)

n) . On April 19, 1999, a criminal information was filed in the District Court for the Eastern District of California, U.S. v. Anahit Margarian, et al., CR-S-99-147, charging Anahit Margarian with Health Care Fraud in violation of 18 U.S.C. § 1347, and Aiding and Abetting in violation of 18 U.S.C § 2. On May 28, 1999, a superseding indictment was filed in U.S. v. Anahit Margarian, CR-S-99-147, charging Health Care Fraud and Aiding and Abetting.

o) . Anahit Margarian was found guilty of Health Care Fraud and Aiding and Abetting (18 U.S.C. § 1347 and 18 U.S.C. § 2) by a jury and was sentenced on June 4, 2001 to a term of 41 months imprisonment.

p) . During Anahit Margarian's sentencing hearing on June 4, 2001, the following exchange was recorded:

> Judge Damrell: You made the comment that this $300,000 down payment, none of that money came from your client?
>
> Mr. Geragos: I said a portion of that money came from her husband's family, and a portion came from her father.

Judge Damrell: You said $70,000, but there was a $300,000 down payment. Am I to assume that none of that money --

Mr. Geragos: I'm not going to say none of that money, because obviously those assets are as a married couple, but a large portion of that was from her husband that he generated in his business.

Judge Damrell: Are you conceding that your client says that some of that $300,000 might have come from that fraud?

Mr. Geragos: I'm conceding that some of that $300,000 likely is.

Judge Damrell: I'm not buying this thing that that $300,000 home that was transferred -- at the time it was transferred to her parents who live in Romania. That doesn't make a lot of sense to me, that this was out of concern for her parents. That just doesn't make any sense.

Mr. Geragos: Her parents come here on a frequent basis, and the parents also provided a large portion of the money. And I explained, I think, in the sentencing memorandum that part of the reason it was done originally was to enable them, post the 1996 Liberation Act -- it was in order to enable them to get a visa to come over here as well.

Judge Damrell: Have the parents ever resided in the home?

Mr. Geragos: For six months every year.

(June 4, 2001 Sentencing Hearing Transcript, pp. 16:23-18:6.)

SECOND CLAIM FOR RELIEF
18 U.S.C. § 1956(a)(1)(B)(i)

5. As and for a second cause of action, the United States alleges and incorporates each of the allegations previously set forth.

6. The defendant real property is property involved in a financial transaction which represents the proceeds of some form of unlawful activity. Anahit Margarian conducted or attempted to conduct such a financial transaction which in fact involved the proceeds of specified unlawful activity, with the intent to promote the carrying on of specified unlawful activity; or knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity is in violation of Title 18 U.S.C. § 1956(a)(1)(B)(i).

7. By reason of the foregoing and pursuant to the provisions of 18 U.S.C. § 981(a)(1)(C) and 18 U.S.C. § 1956 (a)(1)(B)(i) the defendant real property is subject to forfeiture to the United States of America.

WHEREFORE, plaintiff prays that:

1. Process issue according to the procedures of this Court in cases of action in rem;

2. Any person having an interest in said defendant be given notice to file a claim and to answer the complaint;

3. This Court enter a judgment of forfeiture of said defendant to the United States; and

4. For such relief as the Court may deem proper.

DATED: 10/22/01

JOHN K. VINCENT
United States Attorney

"s/Courtney J. Linn"
Assistant U.S. Attorney

SHAWN R. PEREZ, ESQ., CA St. Bar # 164228
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(949) 492-9545
(949) 492-9538 *Facsimile*

FILED
NOV 15 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO, Defendant. LEVON MARKARIAN and EVA MARKARIAN, Claimants.	CIV.S-01-1956 FCD JFM CLAIM TO DEFEND FORFEITURE PURSUANT TO SUPPLEMENTAL RULE C(6)

Claimants LEVON MARKARIAN and EVA MARKARIAN, through undersigned counsel, file this verified claim praying for the release and restitution of the Real Property Located at 5208 Los Franciscos Way, Los Angeles, California, APN: 5588-021-018, Including All Appurtenanc-

es and Improvements Thereto from them on or about October 22, 2001. As grounds for this claim, claimants state the following:

1. I, LEVON MARKARIAN, along with my spouse, am the owner of the aforementioned real property seized by the United States. I hereby demand its restitution and claim the right to defend this action.

2. I, EVA MARKARIAN, along with my spouse, am the owner of the aforementioned real property seized by the United States. I hereby demand its restitution and claim the right to defend this action.

VERIFICATION

I, EVA MARKARIAN, do hereby verify that I have read the foregoing claim, and declare under penalty of perjury that the allegations therein are true and correct.

Executed on this 7th day of November, 2001.

"s/Eva Markarian"
EVA MARKARIAN

I, LEVON MARKARIAN, do hereby verify that I have read the foregoing claim, and declare under penalty of perjury that the allegations therein are true and correct.

Executed on this 7th day of November, 2001.

"s/Levon Markarian"
LEVON MARKARIAN

By: "s/Shawn R. Perez"
SHAWN R. PEREZ, Attorney
For Claimants, Eva and Levon
Markarian

JOHN K. VINCENT
United States Attorney
COURTNEY J. LINN
Assistant U.S. Attorney
501 I Street, Suite 10-100
Sacramento, CA 95514
Telephone: (916) 554-2755

DATED
OCT 22 2001
01 2019392

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO, Defendant.	CIV.S-01-1956 FCD JFM LIS PENDENS NOTICE OF PENDING ACTION (California Code of Civil Procedure § 405) Recorded Owners: Levon and Eva Markarian

NOTICE IS HEREBY GIVEN, pursuant to Section 405 of the California Code of Civil Procedure, that the above-entitled action concerns and affects the following real property:

> Real property located in Los Angeles County at 5208 Los Franciscos Way, Los Angeles, California, Assessor's Parcel Number 5588-021-018, and more fully described as:

01 2019392

LOT 25 OF TRACT NO. 29326, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 721 PAGES 15 TO 17 INCLUSIVE OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

Said action was commenced on October 22, 2001, in the above-named court by the United States of America, plaintiff, against 5208 Los Franciscos Way, Los Angeles County, California, defendant. Levon Markarian and Eva Markarian are the recorded owners. Said action is now pending in the above-named court.

The object of plaintiff's action is the civil forfeiture of the above-referenced real property to the United States pursuant to 18 U.S.C. § 981.

If the plaintiff's action is successful, title to the subject property will vest in the United States pursuant to 18 U.S.C. 981(a)(1)(C), as defined in 18 U.S.C. § 1956 (c)(7)(F).

DATED : 10/22/01

JOHN K VINCENT
United States Attorney

"s/Courtney J. Linn"
Courtney J. Linn
Assistant U.S. Attorney

ACKNOWLEDGMENT

State of California)
County of Sacramento)

On (unreadable) before me, Rosemary K. Shaul, Notary Public, personally appeared COURTNEY J. LINN, Assistant

U.S. Attorney, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

"s/Rosemary K. Shaul"
SIGNATURE

ROSEMARY K. SHAUL
Commission # 1308530
"SEAL" Notary Public – California
Sacramento County
My Comm. Expires Jun 10, 2005

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FILED
JUL 24 2002

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. REAL PROPERTY LOCATED AT 5208 LOS FRANCISCOS WAY, LOS ANGELES, CALIFORNIA, APN: 5588-021-018 INCLUDING ALL APPURTENANCES AND IMPROVEMENTS THERETO, Defendant.	CIV.S-01-1956 FCD JFM CIV- NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT Date: September 13, 2002 Time: 10:00 a.m. Court: Courtroom 2 15th Floor

NOTICE

PLEASE TAKE NOTICE that on September 13, 2002 at 10:00 a.m., or as soon thereafter as may be heard, in the Courtroom of the Honorable Frank C Damrell, Jr., United States District Judge, in the Federal Courthouse Building, 501 I Street, 15th Floor, Courtroom No. 2, Sacramento, California, plaintiff, United States of America, will move the Court to have heard its Motion for Summary Judgment.

MOTION

Plaintiff, United States of America, by and through its undersigned counsel, moves this Court for summary judgment. Plaintiff moves for summary judgment on the following grounds:

1. Levon and Eva Markarian, the sole non-settling claimants remaining in this action, lack standing under Article III of the United States Constitution to maintain a claim.

2. Because the United States has entered into settlements with the other claimants in this action, and because no other claimants have come forward to assert timely claims, the United States further requests that a final judgment of forfeiture shall be entered in a form consistent with prior settlements that vests all right, title and interest in the defendant real property to the United States.

Plaintiff bases its Motion for Summary Judgment on this Motion, the Memorandum of Points and Authorities in support thereof, the Request for Judicial Notice, the declarations of William Cherkezian, Robert Rybarczyk and Glenn Purdy, the Court's files and records in this matter, and any oral argument that may be presented to the Court.

WHEREFORE, the United States respectfully moves that summary judgment be entered.

DATED: 7/24/02

JOHN K. VINCENT
United States Attorney

By: "s/Courtney J. Linn"
COURTNEY J. LINN
Assistant U.S. Attorney